U.S. Department of Labor

Office of Administrative Law Judges
O'Neill Federal Building - Room 411
10 Causeway Street
Boston, MA 02222

(617) 223-9355
(617) 223-4254 (FAX)

Issue Date: 16 June 2005

CASE NO.: 2003-LHC-2624

OWCP NO.: 1-157762

In the Matter of

SCOTT POLIQUIN
Claimant

v.

ELECTRIC BOAT CORPORATION
Employer

Appearances:

William Gately, Esq., Fall River, Massachusetts, for the Claimant

Conrad M. Cutcliffe, Esq., Cutcliffe, Glavin & Archetto, Providence, Rhode Island, for the Employer

Before: Colleen A. Geraghty
Administrative Law Judge

DECISION AND ORDER DENYING BENEFITS

I. Statement of the Case

The present matter is a claim for workers' compensation and medical benefits for hearing loss filed by Scott Poliquin (the "Claimant") against the Electric Boat Corporation ("Electric Boat" or the "Employer") under the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901 *et seq.* (the "Act"). After an informal conference before the District Director of the Department of Labor's Office of Workers' Compensation Programs ("OWCP"), the matter was referred to the Office of Administrative Law Judges for a formal hearing, which was conducted before the undersigned administrative law judge on May 19, 2004 in New London, Connecticut.

The Claimant appeared represented by counsel, and an appearance was made on behalf of the Employer. At the hearing, the parties were afforded the opportunity to present evidence and oral argument. Testimony was heard from the Claimant, and documentary evidence was admitted as Claimant's Exhibits ("CX") 1-2 and Employer's Exhibits ("EX") 1-13. Formal papers were admitted as Administrative Law Judge Exhibits ("ALJX") 1-4. Thereafter, the parties filed post-hearing briefs, and the record is now closed.

After careful analysis of the evidence contained in the record, the parties' stipulations and their closing arguments, I have concluded that the Claimant is not entitled to benefits for hearing loss under the Act.

My findings of fact and conclusions of law are set forth below.

II. Stipulations and Issues Presented

At hearing, the parties orally stipulated to the following: (1) the Act applies to the present claim; (2) there was an employment relationship between the Claimant and the Employer; (3) the Claim was timely noticed, filed and controverted; (4) the Claimant reached maximum medical improvement on March 21, 2003; (5) the average weekly wage is $203.66; and (6) the Special Fund does not apply. Hearing Transcript ("TR") 5.

The remaining issues to be adjudicated at hearing are (1) causation and (2) the nature and extent of the Claimant's disability.

III. Findings of Fact and Conclusions of Law

A. Background

The Claimant, Scott Poliquin, was 43 years old at the time of the formal hearing. TR 15. He worked as a welder for the Employer, Electric Boat Corporation, for approximately two years from 1980 to July 16, 1982. TR 16; EX 3. The Claimant also performed "carbon out gouging" in the ballast tanks of the Employer's submarines, which is a process that involves using high-pressure air from a welder to melt and blow steel away from the welds and thus ensure that the welds are clean and resistant to cracking. TR 17-19. The Claimant testified that he performed this activity inside the confines of the ballast tanks, and that the noise from the high air pressure was "just like being behind a jet engine." TR 18. He stated that he wore rubber ear plugs for hearing protection, but that he could not wear cups for protection because they did not fit over the helmets. TR 21. The Claimant further stated that he did not notice any problem with his hearing during his employment at Electric Boat. *Id.*

The Employer terminated the Claimant's employment for violation of company policy. TR 22; EX 12. The Claimant testified that he was diagnosed with mononucleosis and did not go to work for approximately one month. TR 21-22. He further stated that he did not call Electric Boat to notify the company of his illness, and that when he returned to work he was terminated. TR 22.

Following his employment at Electric Boat, the Claimant worked as a welder for Jaswell Drill Corporation, where he also built drill rigs and did pump work for homes. TR 23, 30-31. The Claimant testified that there was no loud noise at Jaswell, and that he did not perform the same type of gouging work there as he did at Electric Boat. TR 23. He further stated that while working for Jaswell he would "very rarely" have to wear headsets, because setting a pump in a home occurs months after the process of drilling holes. TR 30. He stated that he would sometimes have to "mud out" drilling rigs that became stuck, but that the rigs were not running at the time. TR 30-31. Following his employment with Jaswell, the Claimant worked at BCMO building and installing conveyors for post offices from 1992 to 1996. TR 23-24. The Claimant testified that his job consisted of bolting the conveyors together and hanging them. TR 24. From 1996 to the present, the Claimant has worked setting pumps for wells. *Id.* He testified that his job duties include pumping the wells and taking water tests, but do not include any drilling. *Id.*

The Claimant testified that his ears began ringing about ten years ago. TR 32. He stated that his ears ring constantly and that he has difficulty hearing people on the telephone. TR 25. The Claimant first saw audiologist Mary Kay Uchmanowicz, M.S., CCC-A., for his hearing on February 15, 2001, when he was referred by Attorney Steven J. Dennis. TR 29; CX 2 at 3-4. He was also examined by Janet Sells, AuD., on July 22, 2003. EX 7 at 5. Ms. Sells' report indicated that the Claimant had ear wax build-up, and the Claimant testified at hearing that he removed the wax by using an ear wax removal kit or has the build-up removed by his family physician, Dr. Joan Mullin. TR 33-34. The Claimant also testified that at the time he sought the audiograms, he sometimes drank four cups of caffeinated coffee per day. TR 32.

A pre-employment audiogram taken on November 16, 1980 at Electric Boat showed the Claimant's hearing to be within normal limits. EX 13 at 1; EX 10; CX 2 at 5. When Ms. Uchmanowicz examined the Claimant in February 2001, she found a 7.5% impairment of the right ear and a 15% impairment of the left ear, which yields a binaural hearing impairment of 8.8% under the *AMA Guides to the Evaluation of Permanent Impairment*, 5th Edition. CX 2 (March 21, 2003 Report attached). Ms. Uchmanowicz also found a 5% impairment under the *Guides* due to the Claimant's tinnitus, bringing the total binaural hearing loss to 13.8%. *Id.* Audiologist Janet Sells found different results when she examined the Claimant in July 2003. Her medical report indicates that the Claimant had no impairment under the *Guides* using sensorineural hearing loss thresholds. EX 13 at 2. Ms. Sells found a .6% binaural impairment (0% monaural impairment for the right ear and 3.8% monaural impairment for the left ear) using the air conduction thresholds. *Id.* Ms. Sells did not add any percentage of impairment for the Claimant's tinnitus, stating that the tinnitus is more likely related to the presence of wax in the Claimant's ear canals and his history of drinking multiple cups of coffee each day. EX 13 at 2-3.

B. Causation

An individual seeking benefits under the Act must, as an initial matter, establish that he suffered an "accidental injury…arising out of and in the course of employment." 33 U.S.C. § 902(2). *Bath Iron Works Corp. v. Brown*, 194 F.3d 1, 4 (1st Cir. 1999). In determining whether an injury arose out of and in the course of employment, the Claimant is assisted by Section 20(a) of the Act, which creates a presumption that a claim comes within its provisions. 33 U.S.C. §920(a). The Claimant establishes a prima facie case by proving that he suffered some harm or pain and that working conditions existed which could have caused the harm. *Brown*, 194 F.3d at

4, *Merrill v. Todd Pacific Shipyards Corp.,* 25 BRBS 140 (1991); *Murphy v. S.C.A./Shayne Brothers*, 7 BRBS 309 (1977) *aff'd mem*. 600 F.2d 280 (D.C.Cir. 1979); *Kelaita v. Triple A Mach. Shop*, 13 BRBS 326 (1981). In presenting his case, the Claimant is not required to introduce affirmative evidence that the working conditions in fact caused his harm; rather, the Claimant must show that working conditions existed which could have caused his harm. *U.S. Industries/Federal Sheet Metal, Inc., v. Dir., OWCP (Riley),* 455 U.S. 608 (1982). In establishing that an injury is work-related, the Claimant need not prove that the employment-related exposures were the predominant or sole cause of the injury. If the injury contributes to, combines with or aggravates a pre-existing disease or underlying condition, the entire resulting disability is compensable. *Independent Stevedore Co. v. O'Leary,* 357 F.2d 812 (9th Cir. 1966); *Rajotte v. General Dynamics Corp.,* 18 BRBS 85 (1986).

Once a claimant establishes a prima facie case, the Claimant has invoked the presumption, and the burden of proof shifts to employer to rebut it with substantial evidence proving the absence of or severing the connection between such harm and employment or working conditions. *Bath Iron Works Corp. v. Dir., OWCP, (Shorette)*, 109 F.3d 53 (1st Cir. 1997); *Merrill*, 25 BRBS at 144; *Parsons Corp. of California v. Dir., OWCP,* 619 F.2d 38 (9th Cir. 1980); *Butler v. District Parking Management Co.*, 363 F. 2d 682 (D.C. Cir. 1966); *Kier v. Bethlehem Steel Corp.,* 16 BRBS 128 (1984). Under the substantial evidence standard, an employer need not establish another agency of causation to rebut the presumption; it is sufficient if a physician unequivocally states to a reasonable degree of medical certainty that the harm suffered by the worker is not related to employment. *O'Kelley v. Dept. of the Army/NAF*, 34 BRBS 39, 41-42 (2000); *Kier,* 16 BRBS at 128. If the presumption is rebutted, it no longer controls, and the administrative law judge must weigh all the evidence and render a decision supported by substantial evidence. *See Del Vecchio v. Bowers*, 196 U.S. 280 (1935); *Holmes v. Universal Maritime Serv. Corp.*, 29 BRBS 18 (1995); *Sprague v. Dir., OWCP,* 688 F. 2d 862 (1st Cir. 1982).

In support of his prima facie case that his hearing loss is work-related, the Claimant testified that he was exposed to loud noise while working as a welder for Electric Boat from 1980 to 1982, stating that the noise level in the submarine ballast tanks "was just like being behind a jet engine." TR 17-18. The Claimant further testified that following his employment at Electric Boat, he was not exposed to loud noise while working for subsequent employers, including Jaswell Drill Corporation and BMCO. TR 23-24. The Claimant's pre-employment audiogram, taken on November 16, 1980, showed the Claimant's hearing to be within normal limits. EX 13 at 1. In February 2001, an audiogram taken by Ms. Uchmanowicz revealed an 8.8 percent binaural impairment under the *Guides*. Based on the Claimant's testimony, the results of his pre-employment audiogram and the results of his February 2001 audiogram as interpreted by Ms. Uchmanowicz, I find that the Claimant has shown that he has suffered hearing loss and that working conditions existed which could have caused the loss. *Brown*, 194 F.3d at 4. The Claimant has thus established his prima facie case and successfully invoked the Section 20(a) presumption that his hearing loss is caused by exposure to injurious noise at Electric Boat.

The burden now shifts to the Employer to rebut the presumption with substantial evidence proving the absence of or severing the connection between such harm and employment or working conditions. *Shorette*, 109 F.3d at 53; *Merrill*, 25 BRBS at 144. In its brief, Electric Boat asserts that the Claimant suffers no compensable binaural hearing loss under the Act. Emp. Br. at 6. To support its assertion, the Employer relies on the medical opinions of audiologist

Janet Sells. Ms. Sells examined the Claimant on July 22, 2003. EX 13. In her report, Ms. Sells concluded that "using the sensoineural hearing loss thresholds, which are a reflection of the amount of impairment that is potentially due to noise exposure, the Guidelines to the Evaluation of Permanent Impairment yielded a 0 percent monaural impairment for the right ear, and a 0 percent monaural impairment for the left ear, and a 0 percent binaural impairment." EX 13 at 2. Ms. Sells did not add any percentage impairment for tinnitus, opining that it did not occur until 5 years after the Claimant left Electric Boat, and is more likely related to the presence of ear wax and the Claimant's history of drinking several cups of caffeinated coffee each day. EX 13 at 3. In addition, Ms. Sells' report notes that the Claimant's word recognition scores were 100 percent bilaterally. *Id.* at 2; *see also* EX 7 at 9. Ms. Sells further concluded that using the air conduction thresholds, which includes the conductive component, the Guides yielded a .6 percent binaural impairment (3.8% percent monaural impairment for the left ear and a 0 percent monaural impairment for the right ear). EX 7 at 12. However, Ms. Sells concludes that the conductive component found in the left ear is "most likely due to the presence of thick wax partially occluding the canal," and that the conductive component is medically treatable. *Id.* Thus, Ms. Sells testified, the Claimant's hearing loss was not caused by industrial noise. EX 7 at 11.

The Employer also asserts that the Claimant was in fact exposed to loud noise while employed for Jaswell. Emp. Br. at 9. The Employer notes that the Claimant testified that hearing headsets were made available at Jaswell, and argues that evidence of hearing protection indicates that loud noise was present during this period. Emp. Br. at 10; TR at 30. In addition, the Employer argues that because the Claimant did not complain of hearing difficulty until ten years after he left Electric Boat and after working for ten years at Jaswell where he did have noise exposure, the Claimant's hearing loss was not caused by the Claimant's employment at Electric Boat. Emp. Br. at 10. The Employer also maintains that the presence of a confirmed ear wax condition is a likely source of any hearing impairment. Finally, the Employer argues that Ms. Uchmanowicz's medical conclusions regarding the cause of the Claimant's hearing loss are based on an erroneous history of noise exposure indicating that the Claimant worked for Electric Boat for a period of five years rather than seventeen months. CX 2; EX 12.

Under the substantial evidence standard, an employer need not establish another agency of causation to rebut the Section 20(a) presumption; it is sufficient if a physician unequivocally states to a reasonable degree of medical certainty that the harm suffered by the worker is not related to employment. *O'Kelley v. Dept. of the Army/NAF*, 34 BRBS 39, 41-42 (2000); *Kier v. Bethlehem Steel Corp*. 16 BRBS 128 (1984). Following this standard, I find that the Employer has successfully rebutted the presumption afforded the Claimant. The Employer has offered the medical opinion of Ms. Sells, who concludes that the Claimant's hearing loss is neither compensable nor due to noise exposure at Electric Boat, and is instead a correctable condition due to ear wax build up. In addition, I do not credit the Claimant's testimony that he was not exposed to loud noise while employed at Jaswell. The fact that hearing protection was provided and worn, even if only occasionally, establishes that there was industrial noise exposure at Jaswell.

Because I have found that the Employer has successfully rebutted the presumption that the Claimant's hearing loss is work-related, the presumption no longer controls, and I must weigh all the evidence and render a decision supported by substantial evidence. *See Del Vecchio*, 196 U.S. at 280; *Holmes*, 29 BRBS at 18; *Sprague,* 688 F. 2d at 862. In evaluating the evidence, the fact-finder is entitled to weigh the medical evidence and draw his own inferences

from it and is not bound to accept the opinion or theory of any particular medical examiner. *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962). It is solely within the discretion of the judge to accept or reject all or any part of any testimony according to his judgment. *Perini Corp. v. Heyde*, 306 F. Supp. 1321 (D.R.I. 1969). *See Poole v. National Steel & Shipbuilding Co.*, 11 BRBS 390 (1979); *Grimes v. George Hyman Constr. Co.*, 8 BRBS 483 (1978), *aff'd mem*., 600 F.2d 280 (D.C. Cir. 1979); *Tyson v. John C. Grimberg Co.*, 8 BRBS 413 (1978).

The opinions of the audiologists in this case are in dispute. Both audiologists state that they performed essentially the same hearing tests on the Claimant, and state that the results of the tests given in February 2001 by Ms. Uchmanowicz and July 2003 by Ms. Sells did not vary meaningfully. CX 2 at 21-22; EX 7 at 14; EX 13 at 2-3. However, the two audiologists arrived at very different ratings: While Ms. Uchmanowicz found a 8.8% binaural hearing loss (excluding the 5% tinnitus rating), Ms. Sells found no compensable hearing loss at all and did not award any additional impairment rating for tinnitus. As discussed below, neither audiologist adequately explains the discrepancy in the final ratings.

Ms. Uchmanowicz agreed with Ms. Sells' report that the test results on both dates were within test/re-test reliability. CX 2 at 21; EX 13 at 3. She testified that Ms. Sells' results were probably accurate, and that the test results could vary as "people have good days and bad days." CX 2 at 22. I find this explanation for the difference in the results unpersuasive, as it does not provide a rational, logical reason for the difference.

Ms. Sells also concedes that the test results taken by both audiologists are within test/re-test reliability. In fact, Ms. Sells' July 2003 report indicates that while the test results were within test/re-test reliability, the July 2003 tests showed better hearing sensitivity than the February 2001 tests. EX 13 at 2. I note that an improvement in the Claimant's hearing more than a year after the initial audiogram by Ms. Uchmanowicz would not be consistent with a permanent impairment. Ms. Sells states that the reason for the discrepancy is unclear, but notes that Ms. Uchmanowicz "recorded the low frequency loss in the left ear as sensorineural when it is actually conductive in nature." *Id.* at 3. In her deposition testimony, Ms. Sells also states that Ms. Uchmanowicz's "numbers for almost each frequency are higher," but that the 7.5 percent impairment that Ms. Uchmanowicz assigns to the Claimant's right ear "is not all that much different" than the rating of Ms. Sells. EX 7 at 14. However, because Ms. Sells finds that the Claimant suffered a 0 percent hearing loss in his right ear, her testimony that the ratings are not all that much different remains confusing. Ms. Sells' explanation for the discrepancies between the test results does not adequately explain how the two audiologists ultimately arrive at such different impairment evaluations when they also concede that the tests given on both dates do not differ meaningfully. As previously noted, I find Ms. Uchmanowicz's explanation for the discrepancies — that the Claimant will have good days and bad days — to be equally unpersuasive. CX 2 at 22. Therefore, I cannot fully accept the opinions and conclusions of either examiner, and find that the evidence in this matter regarding the issue of causation and whether the Claimant has compensable hearing loss remains in equipoise.

The United States Supreme Court has held that a claimant retains the ultimate burden of persuasion under the Longshore Act and must prove his case by a preponderance of the evidence. *Dir., OWCP v. Greenwich Collieries,* 512 U.S. 267, 272, 277-78 (1994). Thus, the Court states, "if the evidence is evenly balanced, the party that bears the burden of persuasion must lose." *Id.* at 272. In the present matter, I have found that the evidence remains in equipoise as neither

hearing expert has adequately or convincingly explained the discrepancies in the Claimant's hearing tests conducted in February 2001 and again in July 2003. Moreover, while I have found that the Claimant was exposed to loud noise when employed at Electric Boat, I have also found that the Claimant was exposed to loud noise when employed at Jaswell Drill Corporation. Based on these determinations, I cannot find that any hearing loss the Claimant may have was caused by exposure to injurious noise at Electric Boat. [1]

Because I have determined that any hearing loss the Claimant may have is not related to his employment at Electric Boat, I need not reach the issues of the nature and extent of injury. Accordingly, the Claimant's claim is hereby denied.

SO ORDERED.

A

COLLEEN A. GERAGHTY
Administrative Law Judge

Boston, Massachusetts

[1] I do not credit Ms. Uchmanowicz's conclusion that the Claimant suffers a 5 percent impairment due to tinnitus. The mere presence of tinnitus does not entitle the Claimant to an extra 5% impairment rating; rather, the Claimant must show how the presence of tinnitus impacts his speech discrimination and activities of daily living and must provide a rationale for determining the appropriate percentage of additional compensation within the range of 0-5%. *See*, *Voccio v. Electric Boat Corp.*, ("the AMA Guides contemplate application of informed judgment by the physician to select a value in this range, and the basis for that judgment should be explained.") 2002-LHC-2247; *Archambault v. Electric Boat Corp.*, ("it is insufficient, analytically, to assign any value in a range without a basis.") 2002-LHC-2182; *Norvish v. Electric Boat Corp.*, (a tinnitus severity rating assignment will not be considered arbitrary if it supported by the evidence, based on the informed judgment of a physician, and if a "sufficient rationale is provided for the physician's selection of a value in the range") 2002-LHC-1968. Absent a reasoned explanation for assessing the maximum 5% impairment rating for tinnitus, the assignment of the maximum of 5% is arbitrary. In her deposition, Ms. Uchmanowicz states that the tinnitus rating she assigned to the Claimant is "kind of an arbitrary percentage," and she does not convincingly explain how she arrived at awarding the rating. CX 2 at 15. Moreover, Ms. Uchmanowicz testified that the tinnitus did not affect the Claimant's job abilities or concentration, and bases her medical opinion on the Claimant's own statements that the tinnitus bothered him socially. *Id.* at 15-16. In addition, Ms. Uchmanowicz testified that the Claimant's tinnitus might bother him on a particular day but not bother him on a different day. *Id.* at 14. Based on this equivocal testimony, I cannot conclude that the Claimant suffered an additional hearing impairment due to tinnitus, and Ms. Uchmanowicz's rationale for her assessment is unpersuasive.

In contrast, Ms. Sells did not assess any impairment for tinnitus because she found 0% permanent impairment for sensoineural hearing loss. Under the Act, an award of permanent impairment for tinnitus can not be made in the absence of a compensable hearing loss. In any event, even if I had credited Ms. Umchamowicz's opinion that the Claimant had a compensable hearing loss, I would not credit her opinion that the Claimant was entitled to an additional 5% permanent impairment from tinnitus. The evidence shows the Claimant's word recognition scores were excellent and he did not establish that tinnitus interfered with normal activities of daily living.